



Information **UPDATE**

Wisconsin Department of Public Instruction/Elizabeth Burmaster, State Superintendent/P.O. Box 7841/ Madison, WI 53707-7841

BULLETIN NO. 04.02

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TO: District Administrators, CESA Administrators, CCDEB Administrators,
Directors of Special Education and Pupil Services, and Other Interested Parties

FROM: Carolyn Stanford Taylor, Assistant State Superintendent
Division for Learning Support: Equity and Advocacy

SUBJECT: How Should Districts Respond When Parents Who Share Legal Custody Do Not Agree Regarding Consent for Evaluation or the Initial Provision of Special Education.

The department has received multiple inquiries related to parent consent for evaluations and the initial provision of special education services in situations where parents share educational decision-making authority for the child. The department has analyzed applicable law and provides the following guidance.

Special education law requires a district to obtain “informed parent consent” before conducting an initial evaluation or a reevaluation of a child with a disability. 34 CFR 300.505(a)(1)(i). The law also requires “informed parent consent” before “initial provision of special education and related services to a child with a disability.” 34 CFR 300.505 (a)(1)(ii).

Consent is defined at 34 CFR 300.500(b)(1) as follows:

Consent means that—

- (i) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (ii) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- (iii)(A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.
- (B) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

Use of the word “parent” rather than “parents,” as well as use of phrases such as “his or her native language,” in these regulations requires the conclusion that either parent may consent to an evaluation or the initial provision of special education. Therefore, a local educational agency (LEA) must proceed with an evaluation of a child with a suspected or known disability or provide initial special education services to a

child with a disability when consent from one custodial parent is received. This is true whether the parents are married, separated, or divorced as long as the parent providing consent has educational decision-making authority for the child. This also remains true in situations where one parent has given consent and the other parent has notified the district of his or her refusal to consent.

If the parents are separated or divorced, both parents retain parental rights under special education law, unless a court order provides otherwise. Letter to Biondi, OSEP 1997, 29 IDELR 972; Letter to Best, OSEP 1998, 30 IDELR 145. In situations of separation or divorce, the LEA should determine whether one or both parents have educational decision-making authority for the child. In the absence of a court order to the contrary, both parents have equal decision-making authority. If a court order exists, the LEA should determine its content. "Legal custody" means the right and responsibility to make major decisions for the child, including educational decisions. "Joint legal custody" means the parents share decision-making authority. If a court orders joint legal custody and makes no other specific provision related to educational decisions, the parents share that decision-making authority. However, a court may order joint legal custody and give one parent sole power to make specified decisions such as educational decisions. Because court orders can vary considerably, it is important to determine the specific provisions.

An LEA must ensure that both custodial parents are afforded an opportunity to participate in the evaluation and placement process and that both custodial parents receive proper notice of decisions regarding their child's education. Either custodial parent has the right to request a due process hearing to challenge the district's proposed actions. Letter to Arnold, OSEP 1983, 211 IDELR 297. In a situation where one custodial parent gives consent and the other custodial parent does not want the child to receive special education, the parent who does not want the district to proceed may request mediation or a due process hearing. The district could request mediation, as well. A hearing officer in a due process hearing requested by a custodial parent to stop the district from proceeding with testing or with the initial provision of special education would determine whether testing is warranted or whether the child has an impairment and a need for special education.

Questions regarding this bulletin may be directed to the Special Education Team at (608) 266-1781.

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